Caruso Electric Corporation *and* International Brotherhood of Electrical Workers, Local Union #86. Cases 3–CA–19704 and 3–CA–19777

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 21, 1997, Administrative Law Judge Judith Ann Dowd issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order which is modified to reflect the amended remedy below.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We affirm the judge's finding that the General Counsel has met his burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), with respect to the Respondent's refusal to hire applicants Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. Specifically, we find that the record establishes that the Respondent was hiring at the time they applied for employment; the applicants had experience and training relevant to the announced or generally known requirements of the position for hire (electricians); and that antiunion animus contributed to the Respondent's decision not to hire them. See *FES*, 331 NLRB No. 20, slip op. at 4 (2000). We also agree with the judge, for the reasons stated by her, that the Respondent failed to satisfy its *Wright Line* burden of showing that it would not have hired Swetman, Smith, Follette, and Ruscher Jr. even in the absence of their union activity.

Contrary to our dissenting colleague, we agree with the judge that the General Counsel satisfied his burden of establishing that the Respondent's hiring decisions during the relevant period were tainted by antiunion animus. The judge credited employee Michael Mawn's testimony that the Respondent's president, Jerry Caruso, directed him to alter the date on his employment application from January 8, 1996, to October 8, 1995, because, in September and October 1995, the Respondent "had union people coming by filling out applications." The judge also found that the date on employee Wayne Gates' application was altered while it was in the Respondent's possession. The Respondent has offered no reason for altering the documents. Caruso's instruction to Mawn to alter the date on his application was directly linked to the Union. With respect to Gates' application, while there is no direct link to the Union, it follows the same pattern and therefore it can be inferred, in the absence of any other explanation, that the alteration was made for the same reason. The falsification of these dates in response to the Union's campaign is sufficient to establish animus. See *Pan American Electric*, 328 NLRB 54 (1999). See also *Ramada Inn*, 172 NLRB 248 (1968).

AMENDED REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, the Respondent shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Having found that the Respondent unlawfully refused to hire Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr., the Respondent shall offer them employment to the positions for which they have applied and are qualified or, if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges they might have enjoyed, and make them whole for any loss of earnings and other benefits computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caruso Electric Corporation, Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. employment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled absence the discrimination against them."

2. Insert the following as paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

"(b) Make Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the amended remedy section of this decision.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr., and within 3 days thereafter notify the employees in writing that this has been done and that the

[3] Because the number of applicants exceeds the number of available jobs, it shall be determined in compliance which of the applicants would have been hired for the openings. *FES*, supra.

unlawful refusals to hire will not be held against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting.

Under the test set forth in *Wright* Line,[1] the General Counsel must initially establish, inter alia, the element of animus. I find that the General Counsel has not established the element of animus, and, therefore, I would dismiss the complaint.

The testimony establishes a backdating of employment applications. More specifically, the credited evidence shows that Respondent Agent Jerry Caruso offered Michael Mawn a job on January 8, 1996. When Mawn sought to write that date on his application, Respondent told him to write October 8, 1995. Caruso explained to Mawn that, in September and October, there had been "union people coming in and filling out applications."

The judge found that this incident shows animus. In my view, it does not do so. The judge conceded that "there is no way of ascertaining the exact details of [Caruso's] plan." Indeed the evidence shows more confusion than a plan. Mawn was not a union applicant. Thus, the backdating of Mawn's application to October 8 would seemingly have the effect of showing that a nonunion applicant was hired at a time when union applicants were rejected. Surely, Respondent would not want to create that impression.

In light of the foregoing, the judge was left to speculation. She guessed that Caruso may have believed that Mawn's application, which shows a well-qualified nonunion electrician, would support Respondent's position that it declined to hire a number of union applicants because nonunion applicants were more experienced. But, as noted, this was pure speculation. There is no showing that Mawn was more qualified than the union applicants.

The judge also found animus in regard to the treatment of Gates' application. Gates filed an application on September 25, and he noted that date on the first page of the application form. Thereafter, someone changed the date from "9–25" to "8–25." Assuming arguendo that Caruso made the change, it is far from clear why he would do so. Conceivably, Respondent might wish to show that it filled the positions before September 19, the date on which the union applicants began to appear. However, it was not, and is not, Respondent's contention that positions were filled before September 19. Again, we do not know why Respondent would make such a change.

As noted above, the judge could not explain what Caruso had in mind.[2] The judge suggested at one point that "it may be that Caruso's plan was simply ill conceived." Notwithstanding this uncertainty, the judge based her finding of animus on these slender reeds. I would let the record speak for itself. There is simply no way of knowing, on this record, why the changes were made. The fact that Caruso referred at one point to the union applicants does not establish the reason for the changes. As noted, the changes are not consistent with a plan to mask an antiunion motive.

The cases relied on by the majority are clearly distinguishable. In *Pan American Electric,* 328 NLRB 57 (1999), there were numerous violations of Section 8(a)(1), showing antiunion animus on the part of the respondent. These violations included the statement by the project superintendent to applicants to backdate their applications because he had "told [union guys] that I am not taking any more applications." In *Ramada Inn*, 172 NLRB 248 (1968), the respondent's manager told an applicant to backdate her application because "some members of the Union had filled out an application form." Thus, in both cases, there was a clear deliberate plan to make it falsely appear that applications were no longer being taken or that nonunion applications had been filed before the union applications. As discussed above, the plan in the instant case is far from clear.

My colleagues say that the backdating in the instant case is not simply relevant to the issue of animus but is "sufficient to establish animus." For the reasons discussed above, I disagree.

Since animus has not been shown, the General Counsel has not established a prima facie case.[3]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

[1] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

[2] Caruso did not testify because of a medical condition.

[3] I do not condone the alteration of documents. I simply cannot say, on this record, that the alterations show an antiunion animus.

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. because they engaged in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. employment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled absent the discrimination against them.

WE WILL make Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr., and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusals to hire will not be used against them in any way.

CARUSO ELECTRIC CORPORATION

Ron Scott, Esq., for the General Counsel.
David W. Lippitt, Esq., of Rochester, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

JUDITH ANN DOWD, Administrative Law Judge. This case was heard in Rochester, New York, on October 15 and 16, 1996. Charges and amended charges were filed by the International Brotherhood of Electrical Workers, Local Union #86 (the Union) on October 25 and December 7, 1995, and May 22 and 23, 1996. On May 24, 1996, the Regional Director for Region 3 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing (complaint). The complaint alleges that Caruso Electric Corporation (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily refusing to consider for employment and refusing to hire the following employees between September 19 and December 31, 1995:

Robert Swetman	Darryl Follette
Keith Huffman	William Ruscher Jr.
James Lembach	Randall Smith
Thomas Burke	David Young

The Respondent filed an answer on June 4, 1996, denying the commission of any unfair labor practices and raising an affirmative defense that certain allegations in the complaint are untimely filed.

Prior to the commencement of the hearing, the General Counsel moved to withdraw paragraph six of the complaint and his unopposed motion was granted. During the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Rochester, New York, where it has been engaged in the business of residential, commercial, and industrial electrical contracting. Annually, Respondent purchases and receives at its Rochester facility, goods valued in excess of $50,000 directly from points outside the State of New York. The complaint alleges, the answer admits, and I find that at all material times, Respondent has been engaged in commerce with in the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.[1]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is an electrical contractor working in new and remodeled buildings. At the time of the hearing the Respondent employed approximately thirty-one full-time employees, all of whom were electricians. At the time of the events described below, the Respondent employed about forty electricians. The Respondent's employee complement fluctuates with the demand for electrical work. Respondent is owned by two brothers, Jerold (Jerry) and Robert Caruso. Jerry Caruso is the president and Robert is the vice president of Respondent. During all relevant times and until March 18, 1996, Jerry Caruso was in charge of the day to day management of Respondent, including all hiring and firing. Robert Caruso was the project manager for all of Respondent's construction jobs. On March 18, 1996, Jerry Caruso suffered a heart attack and Robert Caruso assumed full control of Respondent's business. Jerry Caruso did not appear at the hearing, citing medical advice that testifying could have adverse health consequences for him.

B. The General Counsel's Prima Facie Case

Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate in regard to hiring employees "to encourage or discourage membership in any labor organization." It is well settled that applicants for employment are employees within the meaning of the Act. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 185–186 (1941). It is also now settled that applicants for

[1] Respondent orally amended its answer and so admitted at the hearing.

employment who are also union organizers retain their status as statutory employees. *NLRB v. Town & Country Electric,* 116 S.Ct. 450 (1995). An employer violates Section 8(a)(3) of the Act if it refuses to hire an applicant for employment because the employee joined or assisted a union and engaged in concerted activities, in order to discourage employees from engaging in protected activities. *Eldeco, Inc.,* 321 NLRB 857 (1996); *Fluor Daniel*, 304 NLRB 970 (1991).

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), the Board enunciated the test to determine employer motivation in cases of alleged discrimination. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's action. The burden then shifts to the employer to demonstrate that the same action would have been taken notwithstanding the protected conduct. *Fluor Daniel, Inc.,* supra.

1. Knowledge

During the period from September 19 to December 5, 1995, the Union sent the eight employees named in the complaint to apply for jobs as electricians with the Respondent. These applicants were instructed to acknowledge their ties to the Union and to accept jobs if they were offered.

Of the eight alleged discriminatees, only Swetman and Follette testified at the hearing. Swetman's testimony bearing on the subject of knowledge shows that he and certain other alleged discriminatees wore clothing with union insignia when they applied for work with the Respondent. Follette testified that he and three other union applicants—Randall Smith, William Ruscher Jr., and Thomas Burke—came to Respondent's office on November 2, 1995, and applied as a group. Smith, Ruscher and Follette all stated on their applications that they were active in union organizing. There was no evidence, however, that Jerry Caruso personally observed any of the alleged discriminatees or that Respondent's office staff told Caruso about the applicants' union insignia or association with union organizers. As noted above, Jerry Caruso, who actually did all of the hiring during the relevant period, did not testify. Under these circumstances, the only clear evidence that Respondent had knowledge of the alleged discriminatees' association with the Union is the information contained in their employment applications.

The applications of five of the alleged discriminatees show that they were paid or voluntary union organizers. David Young and Robert Swetman indicated that they were currently employed by the Union as organizers. Randall Smith, William Ruscher Jr., and Darryl Follette listed "union organizer" under additional relevant information. The applications of Thomas Burke and Keith Huffman are devoid of any overt reference to affiliation with, or membership in, the Union. However, Burke listed prior employment with Billiter Electric and Huffman acknowledged that he had three years of training in the Union's apprenticeship program. Respondent's witness, Robert Caruso, admitted that Billiter Electric was well known as a union company and that that Respondent would assume electricians who had worked there would remain union members. Robert Caruso also testified that the Respondent would assume that an employee who apprenticed with the Union would remain a union member for life. The application of James Lembach is devoid of any information that would identify him as a union member, any history of employment with known union companies, or any training in a union apprenticeship program. As discussed above, the fact that Lembach applied at the same time as Swetman and may have worn a union jacket is insufficient to demonstrate knowledge, without a further showing that such information was conveyed to Jerry Caruso.

I find that the General Counsel established knowledge with respect to all of the alleged discriminatees except James Lembach. I recommend that the portion of the complaint alleging that the Respondent discriminatorily refused to hire Lembach be dismissed.

2. Animus

In order to establish union animus the General Counsel elicited testimony from employees Michael Mawn and Wayne Gates and introduced their employment applications into evidence. Mawn testified that he filed an employment application with the Respondent on December 20,1995, and that he was called back to talk to Jerry Caruso on January 8, 1996, at which time Caruso offered him employment. Mawn stated that during the interview, Caruso noticed that the front of the employee's application was undated and handed it to him to fill in the date. According to Mawn, he began writing that day's date, but after he put down the numbers 1 and 8, Caruso stopped him and told him to alter the figure 1 to a 10, and to write the date October 8, 1995, on the front of the application. Mawn testified that Caruso told him that in September and early October 1995, the Respondent had "had union people coming by filling out applications." Mawn's application contains no reference to the Union, to union apprenticeship, or employment with a known union contractor. The date at the top of the first page of Mawn's application shows a peculiarly elongated 0, a fact which is consistent with Mawn's testimony.

Gates testified that he filed an application with the Respondent on September 25, 1995, and that he wrote the date September 25, 1995, on the first page of the application form. When the General Counsel showed Gates a copy of his application, Gates identified it and testified that he did not write the date on the front page of the document which now shows August 25, 1995. The date at the top of the first page of Gates' application shows traces of a figure 9 in the same position where the figure 8 now appears.

Respondent contends that Mawn was not a credible witness. Contrary to Respondent's contention, Mawn appeared to be quite credible. He exhibited some initial confusion as to the dates he came to Respondent's office but I am satisfied that his memory of his conversation with Caruso was clear and reliable. I also perceive no compelling reason why Mawn would fabricate the date change incident.

Respondent also contends that Caruso had no reason to alter the dates on the front of Mawn's and Gates' applications because the dates as altered do not help Respondent's position. Specifically, Respondent argues that the change of date from January to October on Mawn's application would have the negative impact on Respondent of showing an apparently nonunion applicant who was hired at a time when a number of avowed union adherents were not. Similarly, with respect to Gates' application, Respondent argues that the apparent date change from September to

August would not help Respondent because the alleged discriminatees in the case did not begin to file applications until September 19, 1995. Respondent also argues that Caruso would have altered the date on the last page of the applications as well as the first, if he intended to deceive Board agents who were investigating the allegations of this complaint.

Since Jerry Caruso was not available to testify, there is no way of ascertaining the exact details of his plan. It may be that Caruso believed that Mawn's application, which shows a well qualified but apparently nonunion electrician, would support Respondent's position that it declined to hire a number of union applicants because the more experienced candidates happened to be nonunion employees. With respect to the inconsistent dates on the first and last pages of the altered applications, Caruso may have intended to remove the last page and substitute an undated copy.[2] It may also be that Caruso's plan simply was ill conceived. In any event, the credited evidence shows that Caruso was responsible for the date alteration on Mawn's application and that the date on Gates' application was altered during a time when it was in the exclusive possession of the Respondent. The credited evidence further shows that Caruso essentially told Mawn that he wanted the date changed on the employee's application because he hoped to manipulate Respondent's statistics concerning the hiring of union and nonunion employees.

I find this evidence sufficient to show that Respondent's hiring decisions during the relevant period were tainted by union animus. The burden therefore shifted to the Respondent to show that it refused to hire the seven remaining alleged discriminatees for nondiscriminatory reasons.

3. Respondent's rebuttal evidence

Respondent contends, inter alia, that although it declined to hire the alleged discriminatees, it did not do so for antiunion reasons, as demonstrated by the fact that it hired other employees who had union backgrounds similar to those of some of the alleged discriminatees. The record evidence supports the Respondent's contention to the extent that of the approximately eleven employees hired during the relevant period, at least three had admitted ties to the Union. The evidence shows that Respondent hired Theodore Kowalczyk, whose application reflects employment with known union contractor Gonzalez Electric; Craig Roberston, who completed the Union's 4-year apprenticeship program; and Anthony Reale, who had 5 years of employment with known union contractor Billiter Electric, a 22-year association with the Union, and 4 years of teaching in the Union's apprentice program. This evidence rebuts the presumption of discrimination, at least with respect to alleged discriminatees Keith Huffman and Thomas Burke, whose only association with the Union was employment by a known union contractor or training in the Union's apprentice program. Indeed, the applications of Kowalczyk and Robertson, both of whom were hired by the Respondent, are essentially indistinguishable with respect to union background from the applications of Keith Huffman and Thomas Burke, who allegedly were refused employment because of their association with the Union. Moreover, successful applicant Anthony Reale's application shows a much closer association with the Union than either alleged discriminatees Huffman or Burke.

I therefore find that the Respondent rebutted the General Counsel's prima facie case with respect to alleged discriminatees Keith Huffman and Thomas Burke. I recommend that the complaint be dismissed with respect to Huffman and Burke.[3]

The remaining five alleged discriminatees are Robert Swetman, Darryl Follette, William Ruscher Jr., Randall Smith, and David Young. As noted above, all of these employees stated on their applications that they were union organizers. Respondent's evidence showing that it hired employees who had a history of association with the Union, employment with a known union contractor, or training in a union apprenticeship program is insufficient to rebut the presumption of discrimination with respect to these admitted union organizers. An employer may be willing to hire employees who have had even an extensive union background, but still discriminate against employees who declare that they are organizers.

Respondent contends that it declined to hire Swetman because of inconsistencies on his various employment applications. With respect to the remaining alleged discriminatees, Respondent contends that during the 30-day period each of their applications remained open, other employees, who acknowledged no association with the Union, were hired because they had better qualifications.[4]

Robert Swetman—Respondent contends that it refused to hire Swetman because he gave inconsistent answers to the question on the application form inquiring whether the applicant had ever been convicted of a felony. The record evidence shows that on an application filed prior to September 19, Swetman checked the "no" box, but on his September 19 application, Swetman marked the "yes" box. Swetman responded "no" to the felony conviction question on his October 10 and December 5 applications. The Respondent elicited testimony from Robert Caruso indicating that Respondent's general practice is to review all prior employment applications filed by applicants, to check for consistency. Caruso stated that inconsistent answers with respect to the felony conviction question would be considered very serious.

Even assuming arguendo, that Respondent has a general practice of reviewing every previous application filed by the employee to check for inconsistencies, there is no evidence concerning when that practice began, whether Jerry Caruso followed that practice, or, more importantly, whether Jerry Caruso relied upon Swetman's inconsistent answers as a basis for failing to hire him. Respondent also fails to explain why it places such importance on inconsistent answers, particularly in light of the fact that it is

[2] I note that four of the application forms submitted by employees who were hired by the Respondent have no signature or date on the last page.

[3] I find it unnecessary to rule on the Respondent's contention that the complaint was untimely filed under Sec. 10 (b) of the Act with respect to Huffman and Lembach, since I have recommended dismissal of the complaint allegations regarding them on other grounds. If the Board declines to adopt these recommendations, I would find that the Respondent's 10(b) argument is without merit for the reasons stated in the brief for the General Counsel.

[4] Respondent had a written policy of holding applications open for no more than 30 days. After that time the employee was required to file a new application. In his brief, the General Counsel does not dispute that the Respondent applied such a policy and does not allege that it was discriminatory.

relatively easy to check a wrong box in a series of "yes" and "no" answers. Respondent does not contend that it checks prior applications only for inconsistent answers to the felony conviction question. Apparently, any inconsistency, even with respect to a relatively innocuous question such as whether the employee is currently on layoff status, would be of concern to the Respondent. This policy concerning inconsistent answers contrasts sharply with Respondent's willingness to overlook other flaws in employee applications, such as incomplete answers to employment history and failure to sign or date the last page of the application form.

Swetman is a highly qualified electrician who holds a master's license and had 15 years' experience as an electrician at the time he filed the applications at issue here. With the possible exception of Reale, whose employment history on his application is incomplete, none of the applicants hired by the Respondent during the period relevant to the complaint had as much electrical work experience as Swetman. Robert Caruso testified that the Respondent considers experience to be a very important factor in making hiring decisions. Moreover, in its brief, Respondent argues that it made a number of hiring choices by selecting the most experienced applicant. In short, the Respondent allegedly rejected a thoroughly experienced electrician for work simply because he checked a wrong box on one of his various applications. At the very least, it is reasonable to assume that if Jerry Caruso was actually concerned about Swetman's inconsistent answers to the felony conviction question, he would have called Swetman in and asked him to explain his answers. Accordingly, I find that Respondent's stated reason for failing to interview or hire Swetman is pretetual.[5]

Smith, Ruscher, and Follette—Randall Smith, William Ruscher Jr., and Darryl Follette all filed applications on November 2, 1995. During the 30-day period the applications of Smith, Ruscher, and Follette were active, the Respondent hired Anthony Reale, Luis Alayon, Simon Kirkland, and James Banker. Respondent contends that all of the employees it hired while the applications of the three voluntary organizers were pending had more electrical experience. The evidence shows that Randall Smith and William Ruscher each had about 2 years' experience as electricians. Darryl Follette had approximately 1-1/2 years' experience.

Turning to the applications of the employees Respondent hired, Anthony Reale had substantial electrical experience and taught in the Union's apprentice program. More importantly, Reale's application also shows that he had previously worked for the Respondent as a supervisor. Luis Alayon's application, on the other hand, shows that he had no previous electrical work experience. Simon Kirkland's application shows a total of eight years' experience in electrical maintenance and electrical work. James Banker had been employed for about 1 year as an electrician at the time that he was hired by Respondent and his previous experience had been 2 years as the owner of a home improvement company and 6 years' experience in carpentry and electrical work.

Hirees Reale and Kirkland had significantly more electrical experience than Smith, Ruscher, or Follette. I therefore find that the decision to hire Reale and Kirkland, rather than any of the union organizers, was not discriminatorily motivated.

Alayon was hired although he had no previous electrical experience or training. Respondent contends that it hired Alayon for an entry level position because it preferred to hire totally inexperienced employees for such positions. Respondent offered no evidence to suggest that it was hiring for particular positions with different skill levels. Thus, the Respondent offered no job descriptions or list of duties that coincided with any of the jobs it filled. However, even assuming, arguendo, that the job for which Alayon was hired was an entry level position, none of the three union organizers were so experienced that they could reasonably considered overqualified for an entry level position. There is also no reason to believe that the applicants would not have accepted an entry level job if it had been offered. Moreover, Respondent's contention that it preferred to hire totally inexperienced employees for entry level jobs contradicts its other stated policy of choosing experienced employees over inexperienced.

James Banker allegedly was hired because he was more experienced than Smith, Ruscher, or Follette. Banker's application shows that although he had a longer employment history than any of the three union organizers, he had only been working as an electrician for 1 year and his other experience was more generalized. Smith, Ruscher, and Follette had worked exclusively as electricians. Accordingly, their more specialized, if less extensive experience, was at least comparable to that of Banker.

I find that the Respondent discriminated against Smith, Ruscher, and Follette by failing to interview or hire these employees because they engaged in union organizing activities.

David Young—Young applied for work with the Respondent on December 5, 1995. Young's application shows approximately 6 years' experience as an electrician, 3 of them as an electrical foreman. Young also is a licensed master electrician. For the 3 years immediately preceding his application, Young was employed as an organizer for the Union.

After Young filed his application with the Respondent, the latter hired William Schell. The Respondent's stated reason for hiring Schell rather than Young is that Schell was already working for the Respondent as an independent contractor and his work was well known to the Respondent. Schell apparently did not file an application with Respondent, so there is no evidence reflecting on his experience and background. Since current employment with the Respondent is an objective basis for preferring Schell over Young, I find that there are no grounds for finding that the

[5] On November 27, 1996, counsel for the General Counsel filed a notice of motion and motion to reopen the record and statement in support thereof. On December 4, counsel for the Respondent filed a statement in opposition. The grounds for the motion to reopen are that Robert Swetman was not asked during the course of the hearing whether or not he had been convicted of a felony. The motion asserts that if the question had been asked, Swetman would have denied any such conviction.

The motion to reopen the record is denied. Respondent does not contend in its brief that Swetman was actually convicted of a felony, it merely asserts that Swetman gave inconsistent answers to this question on his various applications. The inconsistent answers are evident from the face of the applications themselves. I therefore find it unnecessary to reopen the record for the purpose of taking further testimony, since Swetman's proffered denial of any felony conviction is irrelevant to the issues in this case.

Respondent discriminated against Young by refusing to interview or hire him.[6]

CONCLUSIONS OF LAW

1. Respondent Caruso Electric Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

2. International Brotherhood of Electrical Workers, Local Union #86 is a labor organization within the meaning of Section 2(5) of the Act.

3. Between the dates of September 19 and December 31, 1995, Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire employment applicants Robert Swetman, Randall Smith, William Ruscher Jr., and Darryl Follette because they engaged in union activities.

4. Except as found above, the Respondent did not engage in any of the unfair labor practices set forth in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I recommend that the Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having violated Section 8(a)(3) and (1) of the Act by refusing to hire certain employees for discriminatory reasons, it is recommended that they be offered immediate employment in the positions for which they have applied and are qualified, to the extent vacancies exist, and they shall be made whole for any earnings lost by reason of the discrimination against them, from the date of the refusal to hire to the date of a bona fide offer of employment. As a caveat, however, it is noted that the make-whole remedy is not to exceed the earnings appurtenant to the vacancy actually filled by the Respondent on the date of discrimination. Thus, it is recommended that, where multiple discrimination findings derive from a single job, the status quo ante shall be restored limiting the individual backpay entitlements on a proportionate basis. Moreover, in all instances, sums due shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed as specified in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors,* 285 NLRB 573 (1988), and *Haberman Construction Co.,* 236 NLRB 79 (1978).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Caruso Electric Corporation, Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging union activity by refusing to hire employees because they engaged in union or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Swetman, Randall Smith, Darryl Follette, and William Ruscher Jr. employment for the type of work for which they applied and qualify or, if nonexistent, to substantially equivalent positions, and make whole these employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Rochester, New York copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be take by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the ResRespondent had take to comply.

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[6] On November 22, 1996, counsel for the Respondent filed a notice of motion to correct transcript which was not opposed by counsel for the General Counsel. The motion is granted except as follows: Respondent's item 5, which seeks to correct p. 20, L. 21 by changing the words "for a" to "the" is denied. The words "for a" should be corrected to "of a." Respondent's item 9 is granted and p. 144, L. 5 is corrected as moved and it is further corrected to add the word "it" after the word "that." Respondent's item 12, seeking to correct p. 146 should properly refer to p. 164, and is granted as to p. 164, L. 19.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."